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14 ZYNGA GAME NETWORK, INC.

15  
16 **IN THE UNITED STATES DISTRICT COURT**  
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
18

19 REBECCA SWIFT, individually, on behalf of the  
20 general public, and all others similarly situated,

21 Plaintiff,

22 v.

23 ZYNGA GAME NETWORK, INC.;  
24 ADKNOWLEDGE, INC.; D/B/A SUPER  
25 REWARDS; KITN MEDIA USA, INC., D/B/A  
26 SUPER REWARDS,

27 Defendants.

Case No.: CV 09-5443 SBA

[PROPOSED] ORDER GRANTING  
DEFENDANT ZYNGA GAME  
NETWORK, INC.'S MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT

Date: June 29, 2010  
Time: 1:00 p.m.  
Judge: Hon. Sandra B. Armstrong  
Ctrm.: 1

Complaint Filed: November 17, 2009

28 Defendant Zynga Game Network, Inc. ("Zynga")'s Motion to Dismiss the First Amended  
29 Complaint of Plaintiff Rebecca Swift came on regularly for hearing before this Court on June 29,  
30 2010. Having read and considered all the papers, oral arguments of counsel, and good cause  
31 appearing therefore, the Court orders that:

32 Zynga's Motion to Dismiss is granted pursuant to Federal Rule of Civil Procedure 12(b)(6)  
33 for failure to state a claim upon which relief can be granted. Plaintiff's claims are barred by Section  
34 230 of the Communications Decency Act of 1996 (the "CDA"). 47 U.S.C. § 230(c)(1). "Section  
35 230(c)(1) immunity was intended to prevent liability that otherwise would obtain under traditional

1 common law.” *Phan v. Pham*, \_\_ Cal.App.4th \_\_, 2010 WL 658244, \*2 (2010); *see also Fair*  
2 *Housing Council of San Fernando Valley v. Roommate.com, LLC*, 521 F.3d 1157, 1175 (9th Cir.  
3 2008). Here, Plaintiff claims that she suffered monetary harm based on third party advertising that  
4 appeared on Zynga’s advertising platform. She brings state law causes of action for unjust  
5 enrichment and for violations of California’s Unfair Competition Law (Calif. Bus. & Prof. C. §§  
6 17200 et seq.) and the Consumer Legal Remedies Act (Calif. Civ. C. §§ 1750 et seq.). The CDA  
7 provides immunity to interactive computer services against all such claims, as this Court recently  
8 held. *Goddard v. Google, Inc.*, 640 F.Supp.2d 1193 (N.D.Cal. 2009).

9 Zynga meets the three-part test to fall within CDA immunity. *Carafano v. Metrosplash*, 339  
10 F.3d 1119, 1123 (9th Cir. 2003).

11 First, there is no dispute that Zynga is the “provider or user of an interactive computer  
12 service.” 47 U.S.C. § 230(c)(1). According to the Complaint, Zynga provides interactive games to  
13 users of social networking platforms such as Facebook and MySpace. FAC, ¶¶ 1, 12, 31.

14 Second, under the Ninth Circuit’s interpretation of the CDA, Swift’s causes of action seek to  
15 treat Zynga as the “publisher or speaker” of third party content. 47 U.S.C. § 230(c)(1); *Barnes v.*  
16 *Yahoo!*, 570 F.3d 1096, 1101-1102 (9th Cir. 2009) (citing negligent publication of advertising as  
17 example of cause of action seeking to treat entity as a “publisher”); *Goddard*, 640 F.Supp.2d at 1195  
18 (Google immune from claims seeking to hold it liable for allegedly providing tools that furthered  
19 fraudulent third-party advertising). While Plaintiff makes several vague, conclusory legal  
20 allegations regarding Zynga’s conduct, the only factual allegations discernible from the Complaint  
21 make clear that Plaintiff seeks to hold Zynga liable for hosting the advertising content of third  
22 parties. Plaintiff alleges that Zynga contracts with advertising aggregators so that advertising will  
23 appear in Zynga games. FAC, ¶¶ 7-8. Plaintiff then alleges that the advertising content of a third  
24 party caused her harm. FAC, ¶ 37. Taken together, these allegations clearly indicate that Swift  
25 wishes to hold Zynga liable for publishing, rather than creating, the content of third parties.

26 Third, the complaint makes no factual allegation that Zynga created or developed the content  
27 that allegedly caused Swift’s harm. Section 230 extends immunity to service providers in all  
28 situations in which they did not participate in the “creation or development” of the particular online

1 content on which a plaintiff bases her claims. 47 U.S.C. § 230(f)(3); *Roommate.com*, 521 F.3d at  
 2 1175. When viewing the complaint, this Court must look beyond “mere ‘labels and conclusions’  
 3 amounting to a ‘formulaic recitation of the elements’ of CDA developer liability.” *Goddard*, 640  
 4 F.Supp.2d at 1196 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).) While the  
 5 complaint repeatedly states that Zynga “created and developed” the advertising content at issue,  
 6 there are no factual allegations to support this legal conclusion. Plaintiff only alleges that misleading  
 7 advertisements resulted in her being charged *by third-party advertisers* for offers resulting in charges  
 8 she did not want. See, FAC, ¶¶ 37-41. The remaining allegations that unspecified “Defendants”  
 9 created and developed the content at issue are accorded no weight as they identify no conduct by  
 10 Zynga for which liability can attach. Plaintiff fails to allege facts sufficient to plausibly suggest that  
 11 Zynga created or developed any of the third party advertisements that allegedly caused Plaintiff’s  
 12 harm.

13 For a second, independent, reason Plaintiff’s complaint also fails. The claims are all  
 14 grounded in fraud, but are not pled with particularity. Any causes of action alleging that a defendant  
 15 engaged in a fraudulent course of conduct must satisfy the particularity requirement of Federal Rule  
 16 of Civil Procedure 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Plaintiff  
 17 seeks to hold Zynga liable for allegedly conspiring with others in the allegedly misleading and  
 18 fraudulent conduct of third-party advertisers. But none of Plaintiff’s factual allegations of the  
 19 Complaint – even if proven – would support the notion that Zynga engaged in any misleading  
 20 conduct with respect to the specific advertising at issue. The Complaint does not identify any of  
 21 “‘the who, what, when, where, and how’ of the misconduct” that Zynga allegedly committed. *Vess*  
 22 *v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d  
 23 616, 627 (9th Cir. 1997)). For example, Plaintiff states that Defendant’s “misleading  
 24 implementation . . . was a substantial factor in Plaintiff’s decision to provide her cell phone number,”  
 25 to a third-party advertiser. FAC ¶ 37. But Plaintiff does not identify what the “misleading  
 26 implementation” was, nor does she explain what advertising offer she thought she was completing  
 27 when she provided her cell phone number. Plaintiff’s conclusory allegations are not pled with  
 28 particularity and are not sufficient to withstand a motion to dismiss.

1 Plaintiff's First Amended Complaint adds conclusory allegations that Zynga "created and  
2 developed" the third-party advertising content that allegedly caused her harm, but has not included  
3 any new facts in comparison to her original complaint that would lead the Court to believe  
4 amendment would be anything but futile. Indeed, Plaintiff has elected not to attempt to amend  
5 further, and thus concedes that granting leave to amend would be futile.

6 In granting this motion to dismiss with prejudice, the Court is guided in this regard by  
7 Congress' intent in enacting the CDA. As the Ninth Circuit, has held:

8 Websites are complicated enterprises, and there will always be close cases where a  
9 clever lawyer could argue that something the website operator did encouraged the  
10 illegality. Such close cases, we believe, must be resolved in favor of immunity, lest  
11 we cut the heart out of section 230 by forcing websites to face death by ten thousand  
12 duck-bites, fighting off claims that they promoted or encouraged — or at least tacitly  
13 assented to — the illegality of third parties.

14 *Roommate.com*, 521 F.3d at 1174-1175. The CDA provides immunity not just from ultimate  
15 liability, but also from the cost of litigation itself.

16 THEREFORE, IT IS HEREBY ORDERED THAT:

17 Zynga's motion to dismiss is granted with prejudice.

18 **IT IS SO ORDERED.**

19 Date: \_\_\_\_\_, 2010

20 The Honorable Sandra Brown Armstrong  
21 United States District Judge

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